85-2132

NO:_____

Supreme Court, U.S.
FILED
MAY 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MARION HOFMANN KEHOE,

PETITIONER,

v

BEATRICE CLAIRE HOFMANN,

RESPONDENT,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Marion H. Kehoe, Petitioner
pro se

Box 1121,

Newberry, FL. 32669

27pp

QUESTION PRESENTED FOR REVIEW

Whether Petitioner shall be divested of title to real property because a judgment decreed an improper deed conveyance by a court appointed commissioner, found recognizable by a sister state court. Subsequently a Rule 60(b)(4) motion was denied and affirmed by the appellate court in conflict with applicable decisions of this Court.

PARTIES

No other petitioner is involved in this petition.

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OPINION BELOW

The Court of Appeals entered its order, with opinion, affirming the Virgin Islands district court's denial of petitioner's F.R.C.P. Rule 60(b)(4) motion on March 31, 1986. See Appendix A.

The Court of Appeals denied petitioner's petition for rehearing on April 29, 1986. See Appendix B.

STATEMENT OF JURISDICTION

On March 31, 1986 the Court of Appeals, Third Circuit entered an order affirming the Virgin Islands district court's June 29, 1984 nunc pro tunc order. See Appendix A.

Petitioner's petition for rehearing filed April 9, 1986 was denied April 29, 1986. See Appendix B.

Motion to stay mandate was filed on April 9, 1986 and time for filing was extended to June 10, 1986 by May 5, 1986 order. See Appendix C.

The jurisdiction of this Court is invoked under Title 28, U.S.C. Section, 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Article IV, Section 1:

> Full, Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other state.

STATEMENT OF THE CASE

In 1972 a Florida court ordered the divestment of title to real property through a deed conveyance by a court appointed commissioner. 1/ This property, situate in the U.S. Virgin Islands was solely owned by Edwin Hofmann who subsequently deeded it to his sister Marion Kehoe. Later Marion brought a quiet title action in Civ. No. 75-580. The court order of April 4, 1977 held the deed conveyance "recognizable and enforceable" and having legal effect. By doing so it created another void judgment. Counsel denied right of appeal.

In 1983 a Fed.R.Civ.P. Rule 60(b)(4) motion to vacate this void order was filed. It was denied at a hearing of January 6, 1984 and

January 25, 1984, and in a nunc pro tunc order dated June 29, 1984. Again a counsel denied right of appeal necessitating Kehoe to take a pro se status.

A March 1, 1984 notice of appeal was filed subsequently becoming a premature appeal to the June 29, 1984 district court order. This case A.C. No. 84-3210 at the Third Circuit was dismissed.

Kehoe, on November 18, 1985 filed a motion to stay execution of judgment by juducial sale with the Third Circuit. The Court discovered this incomplete appeal and ordered a process leading to a December 4, 1985 oral argument in 84-3210. On March 31, 1986 the court affirmed the district court's denial of Kehoe's Rule 60(b)(4) holding that she failed, "to demonstrate that the 1977 judgment is in any way void." The petitioner's rehearing was denied April 29, 1986. See Appendix B.

Motion to stay certification/mandate was granted to June 10, 1986. A motion for extension was mailed May 19, 1986. See

Appendix C.

Re Appendix A - Opinion and Order dated March 31, 1986 contains error of fact as follows: Page 2. The Florida decree provides a deed conveyance by a court appointed commissioner to U. S. Virgin Islands real property, in conflict with decisions of the Florida Supreme Court and this Court. 1/ Page 3. Kehoe, through counsel in 1983 filed a Fed.R.Civ.P. Rule 60(b)(4) motion to vacate the district court's April 4, 1977 order.

Kehoe by Edwin, power of attorney, filed by advise of court, a "delayed" notice of appeal in the denied Rule 60(b)(4) motion on March 1, 1984. Any appeal of the April 4, 1977 order would have been jurisdictionally defective.

Page 7. No. 84-3210 was an appeal in the district court's denial of a Rule 60(b)(4) motion to vacate the April 4, 1977 order. And only in that way did it involve the latter.

1/ This deed was duly recorded by the Florida commissioner in the U. S. Virgin Island Recorder of Deed on July 5, 1972.

REASON FOR GRANTING THE WRIT

Where petitioner's grantor, Edwin Hofmann was divested of solely owned title to foreign real property, by a deed conveyance by a court appointed commissioner and the situs district court finds the invalid deed valid and lawful. Both judgments are void ab initio. Affirmance Appellate Court, Third Circuit, in deciding a federal question in a way in conflict with applicable decisions of this Court, review is required by this Court.

This Court's Fall v Eastin, 215 US 1, 54 L ed 65, 30 Sup Ct Rep 3, (1909), not overruled, established the principle rejecting the use of a commissioner to convey the title of real property located in another state. It held:

> "A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed to another."
>
> "...neither the decree itself nor any conveyance under it except by the person in whom title is vested can operate beyond jurisdiction of the courts."

The Florida court from which the invalid

deed arose was in conflict with Florida law found in Winn v Strickland, 16 So 606, at 612 (Fla S.C. to 1894), not overruled, which held:

> "The courts of one state, however, have no power to divest title to real estate situated in another state, or to appoint commissioners with authority to transfer title to such property."

Florida courts have consistently applied this principle when a foreign court attempts to divest title by court appointed commissioners to real property situate Florida. A December 1985 case, citing Fall v Eastin, in Sammons v Sammons, 479 So 2d 223 at 225 (Fla App 3 Distr 1985) rejects the Colorado court's decree holding it is not entitled to full faith and credit in its judgment directly affecting title to realty in Florida.

The district court attempted to operate on the Florida void deed conveyance as "recognizable and enforceable", thereby reducing its judgment to another void judgment. This was abuse of discretion and usurpation of power. No equity was heard.

In the Virgin Islands, the statutory provision to distribute marital property is on the homestead which was not the case in this instance. See Dyndul v Dyndul, No. 75 -2402, 3rd Cir (1975).

The Third Circuit held that no "demonstration" was made by petitioner, but in fact, both federal courts chose to operate on void judgments. Federal courts cannot overrule state law. Through their abuse of discretion and usurpation of power, in these instances, the federal courts are in conflict with decisions of this Court and the Constitution Article IV, Section 1. Other circuits find these and Fall v Eastin as controlling in matters of adjudicating real property in sister states.

49 C.J.S., Judgments, Sec. 451 at 882, states:

> "Avoid judgment cannot be made valid and operative by...the taking of an appeal from it, or even by an affirmance on appeal."

3 Am. Jur., Sec. 1167 at 882, states:

"The affirmance of a void judgment

> imparts no validity to it, especially if such affirmance is put upon grounds not touching its validity."

This instant case, the two successive courts have ruled for void judgments from the ab initio Florida void judgment. The district court through abuse of discretion and usurpation of its powers recognized the Florida judgment and its deed conveyance in its April 4, 1977 order and in its denial of a Rule 60(b)(4) motion to vacate. The Third Circuit affirmed. This requires resolution by this Court.

"The question is narrow in compass", Fall v Eastin. Disposition as law and justice require and petitioner prays for vacation of the Third Circuit's affirmance of the lower court's void judgment. And the invalid deed conveyance on file at the U. S. Virgin Islands Recorder of Deeds be expunged from their record by appropriate Court order.

CONCLUSION

For the foregoing reasons, petitioner Marion Kehoe requests that a writ of certiorari issue to review the judgment of the U. S. Court of Appeals, Third Circuit.

NO:_____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MARION HOFMANN KEHOE,

PETITIONER,

v

BEATRICE CLAIRE HOFMANN,

RESPONDENT,

APPEARANCE

The Clerk will please enter my appearance for the Petitioner, Marion Hofmann Kehoe, pro se.

Marion H Kehoe

Marion Hofmann Kehoe,
pro se
Box 1121,
Newberry, Fl. 32669

NO:_____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MARION HOFMANN KEHOE,

PETITIONER,

v

BEATRICE CLAIRE HOFMANN,

RESPONDENT,

PROOF OF SERVICE

STATE OF FLORIDA)
) ss:
COUNTY OF LEE)

I, Edwin J. Hofmann being duly sworn, deposes and says:

That I am the power of attorney for petitioner and pursuant to Rule 28.5(c) this Court I have served PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD CIRCUIT on counsel for respondent by the U. S.

Mails, postage prepaid, addressed to:

John Mahon, Attorney,
Box 398,
Charlotte Amalie,
U. S. Virgin Islands, 00801

and dispatched in the U. S. Mails

this 28th day of May, 1986.

Edwin J. Hofmann
325-B W. Marianna
N. Ft. Myers, FL 33903

Subscribed and Sworn to before me

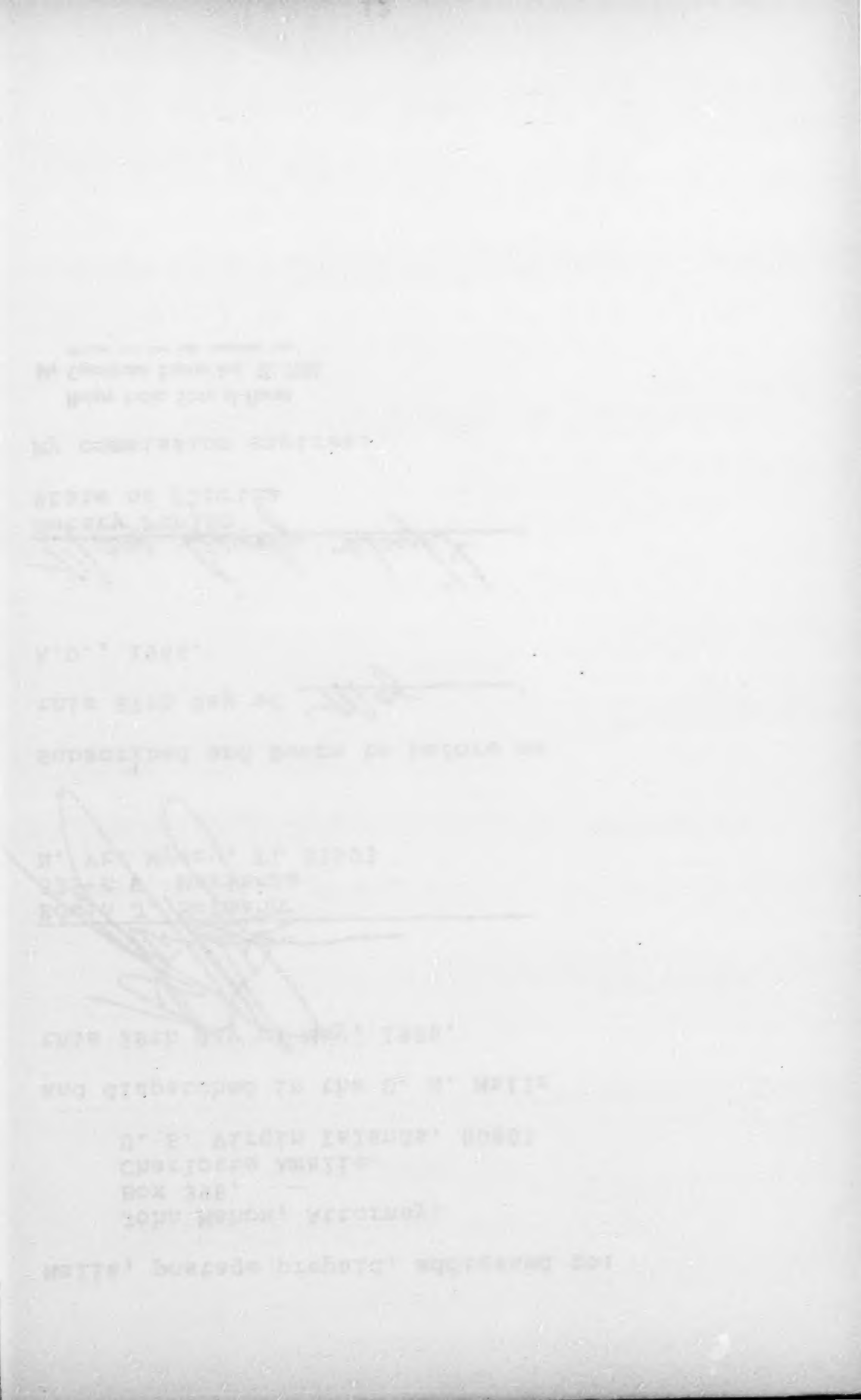
this 27th day of May,

A.D., 1986.

Mary Sandy Wright
Notary Public
State of Florida

My commission expires:

Notary Public, State of Florida
My Commission Expires Aug. 15, 1986
Bonded Thru Troy Fain - Insurance, Inc.



UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARION H. KEHOE,

APPELLANT,

v.

Entered:
March 31, 1986

BEATRICE C. HOFMANN,

APPELLEE,

NO. 85-3029, 85-3030, 85- 3058, 84-3210

OPINION OF THE COURT

A brief background of the controversey giving rise to these actions and appeals will be helpful in understanding the parties and their positions in this litigation.

In 1972, Beatrice C. Hofmann, the defendant/appellee here, obtained a Florida divorce decree dissolving her marriage with Edwin J. Hof mann. Among other things, this decree directed Edwin to convey to Beatrice certain real estate in the Virgin Islands. At some point in time, Edwin purportedly conveyed the property in question to his sister, Marion Keheo, plaintiff/appellant herein.

Edwin filed a power of attorney to act for Marion Kehoe, and we permitted him to

appear pro se and as attorney for Marion Kehoe in these appeals. We also permitted Edwin to file supplemental papers with the court after oral argument. Consideration has been given to all such submissions.

In 1975, Kehoe filed a complaint in the District Court of the Virgin Islands Islands against Beatrice Claire Hofmann to determine an adverse claim by Beatrice to two pieces of real estate in the Virgin Islands. On April 4, 1977, the District Court of the Virgin Islands entered an order granting Beatrice's motion for summary judgment, and declaring that Beatrice possessed an undivided one-half interest in the two parcels. Kehoe did not file a timely appeal from that judgment at that time.

On August 4, 1983, Edwin Hofmann claiming under or through Marion Kehoe, filed a motion pursuant to Fed.R.Civ.P. 60(b)(4). /1

/1 Except where particular reference to Edwin Hofmann is made due to actions taken by him which bear separate mention, through out this opinion we have referred to Kehoe as the appellant inasmuch as motions have been filed

By that motion he sought to vacate the April 4, 1977 judgment. The district court from the bench denied Edwin's Rule 60(b)(4) motion on January 6, 1984. On January 25, 1985, the district court denied Edwin's motion for reconsideration of the January 6th order. Neither the January 6th nor Janauary 25th orders were reduced to writing at that time and thus were not filed or entered.

On March 15, 1984, Edwin filed a notice of appeal which purportedly was taken from the April 4, 1977 order which had granted summary judgment to Beatrice. This appeal was docketed in this court as Appeal No. 84-3210. On May 1, 1984, an "amended" notice of appeal from the January 6, 1984 order (which denied Edwin's 60(b)(4) motion was filed. That appeal also bore docket No. 84-3210. On June 29, 1984. the district court entered the January 6, 1984 and January 23, 1984 orders nunc pro tunc to the respective dates of their announcements from

/1 by Kehoe and Edwin interchangeably. Additionally, Edwin acted under Kehoe's power of attorney.

by that motion as sought to vacate the April 6,
1977 judgment. The district court then the
bench denied Edwin's Rule 60(b)(4) motion on
January 6, 1984. On January 25, 1985, the dis-
trict court denied Edwin's motion for reconsi-
deration of the January 6th order. Neither
the January 6th nor January 25th orders were
reduced to writing at that time and thus were
not filed or entered.

On March 15, 1984, Edwin filed a notice of
appeal which purportedly was taken from the
April 6, 1977 order which had granted summary
judgment to Beatrice. This appeal was docketed
in this court as Appeal No. 84-5210. On May 1,
1984, on "remand" notice of appeal from the
January 6, 1984 order (which denied Edwin's
60(b)(4) motion was filed. This appeal also
bore docket No. 84-5210. On June 27, 1984, the
district court entered the January 6, 1984 and
January 25, 1984 orders nunc pro tunc to the
respective dates of their entry/docketing from
which Edwin noted under Rule 4's power of
attorney.

the bench. These orders for the first time were reduced to writing and filed.

Om July 10, 1984, appeal No. 84-3210 was dismissed by a motions panel of this court "as premature, and without prejudice to an appeal following the prompt disposition of pending Rule 60 motion." Apparently, this court's motion panel had not received information that the district court's written order dated June 29, 1984 had been entered when the panel dismissed Appeal No.84-3210.

Kehoe appealed the June 29, 1984 order of the district court. Kehoe's notice of appeal was dated July 14, 1984 and allegedly mailed from the United States by Kehoe on July 21, 1984. This appeal, docket as No. 84-3515, was received by the clerk of the district court of the Virgin Islands on August 1, 1984, two days after the permissible 30 day period for filing a notice of appeal pursuant to Rule 4 of the Fed.R.App.P.

On August 27, 1984, Kehoe filed a motion for extension of time within which to file an

appeal of the June 29, 1984 order pursuant to Fed.R.App.P. 4(a)(5). On October 16, 1984 the district court denied Kehoe's motion for an extension due to Kehoe's failure to demonstrate excusable neglect. /1

On November 5, 1984, Kehoe filed a notice of appeal from the district court's October 16 1984 order. On November 20, 1984 Kehoe filed a motion for reconsideration of the October 16, 1984 order in the district court. On December 12, 1984, the district court entered an order denying Kehoe's motion for reconsideration. On the same day Kehoe filed a renewed motion for reconsideration which was denied by order of december 12, 1984. On January 4, 1985, Kehoe filed a notice of appeal from December 12,1984 order. On January 15,1985 Kehoe filed notice of appeal from the December 28, 1984 order.

On February 6, 1985 this court granted

/1 The district court stated it believed it lacked jurisdiction to entertain Rule 60(b)(4) motion pending disposition of Kehoe's appeal filed March 15, 1984 docketed at No.84-3210. On October 29, 1984 a motions panel of this court dismissed Kehoe's appeal No. 84-3515. That appeal is not involved in this proceeding.

Kehoe's motion to consolidate the appeals of November 5, 1984 (No.85-3030), January 4, 1985 NNo.85-3029), and Janaury 15, 1985 (No.85-3058 since all were derived from the district court October 16, 1984 denial of Kehoe's motion to file an appeal of the June 29, 1984 order. The June 29, 1984 order had memorialized the district court's January orders denying Kehoe's Rule 60(b)(4) motion to vacate the April 4, 1977 order granting summary judgment in favor of Beatrice Hofmann and against Kehoe.

The district court's primary rationale for denying Kehoe's motion for an extension was its belief that it lacked jurisdiction of the matter pending the disposition of Kehoe's appeal docketed in this court at No. 84-3210. The district court was correct.

As noted earlier, on May 1, 1984, Kehoe filed a notice of appeal docketed in this court at No. 84-3210, purporting to appeal the January 6, 1984 denial of KehOe's Rule (60)(4) motion to vacate the April 4, 1977 summary judgment order. It will be recalled

that the January 6, 1984 bench order was not until June 29, 1984. Therefore, as of May 1, 1984, Kehoe's appeal, No. 84-3210, was premature and did not become effective until June 29, 1984 pursuant to Fed.R.App.P. 4(a)(2) /2. Thus, the district court's June 29, 1984 nunc pro tunc entry of its January 6, 1984 and January 25, 1984 bench rulings rendered effective and timely Kehoe's May 1, 1984 appeal No. 84-3210. Recognizing that appeal No. 84-3210 was the only appeal which substantialy involved the April 4, 1977 summary judgment order entered in favor of Beatrice, and also recognizing that at the date appeal No. 84-3210 was by a motions panel of this court because the June 29, 1984 written order of the district court had not been made known to the motions panel of this court, we entered an order on

/2. According to Fed.R.App.P. 4(a)(2):

> Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry entry and on the day thereof.

November 18, 1985 which permitted Kehoe to move to vacate the July 10, 1984 dismissal of appeal No. 84-3210. We also provided in that if we vacated the July 10, 1984 order of dismissal we would hear the merits of appeal No. 84-3210. The text of that order is reproduced as an addendum to this opinion.

We conclude that appeal No. 84-3210 should not have been dismissed on July 10, 1984, and we hereby vacate the motion panel's order of July 10, 1984 which dismissed that appeal. We also reopen appeal No. 84-3210 on the merits. We do so because as noted, a premature notice of appeal becomes effective upon subsequent entry of a properly appealable order. An appellate court obtains jurisdiction of the prematurely filed appeal as of the date of entry of the order , June 29, 1984. The district court had no jurisdiction over any proceedings subsequent to June 29, 1984. Thus, the district court had no jurisdiction over Kehoe's August 27, 1984 Rule 4(a)(5) motion, or her subsequent motions of November 20, 1984 (motion to reconsider) and

and December 12, 1984 (renewed motion to reconsider). Because the district court was without jurisdiction, the notices of appeal filed from those orders could not establish jurisdiction in this court. Accordingly, appeal Nos. 85-3030 and 85-3058, and 85-3029, the three appeals taken from the October 16, 1984, December 12, 1984 and December 28, 1984 district court orders will be dismissed.

As to Kehoe's remaining appeals No. 84-3210, which we have reopened, after reviewing the record and all submissions, we conclude that the district court did not abuse its discretion in denying Kehoe's Rule 60(b)(4) motion which attacked the April 4, 1977 order granting summary judgment against Kehoe. Kehoe has failed to demonstrate that the 1977 judgment is in any way void. Accordingly, we affirm the district court's June 29, 1984 order (memorializing its January 6, 1984 bench order) denying Kehoe's Rule 6-(b)(4) motion to vacate the April 4, 1977 judgment.

Additionally, subsequent to oral argument

in this case,, Kehoe, through motion made by Edwin Hofmann acting under her power of attorney, sought to have this court review the transcript of proceedings entitle "In Re: The Marriage of Edwin J. Hofmann, Husband, and Beatrice C. Hofmann, Wife, Case No.71-1088-CA" before Circuit Judge Starnes in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida. Kehoe's motion is denied.

Thus, we order the following:

1. Appeal Nos. 85-3039, 85-3030, and 85-3058 will be dismissed.

2. The order of this court dated July 10, 1984, which dismissed appeal No. 84-3210, will be vacated.

3. Appeal No. 84-3210 will be reopened.

4. After consideration of the merits, we will affirm the district court's order of June 29, 1984, which gave rise to appeals No. 84-3210.

5. The December 19, 1985 motion by Kehoe seeking review of a transcript of proceedings before the Circuit Court of the Twentieth Judcial Circuit in and for Lee County, Florida, is denied.

TO THE CLERK:

Please file the foregoing opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARION H. KEHOE,

APPELLANT,

v.

Entered:
November 18, 1985

BEATRICE C. HOFMANN,

APPELLEE.

NOS. 85-3029, 85-3030, 85-3058, 84-3210

ADDENDUM TO OPINION

ORDER

It is ORDERED that:

At the court's session on December 4,1985, this court will entertain a motion to vacate the July 10, 1984 dismissal of appeal No. 84-3210, which was an appeal by Marion Kehoe from the January 6, 1984 denial of a 60(b)(4) motion sought to vacate the April 4, 1977 summary judgment order in favor of Beatrice C. Hof mann; it is further

ORDERED that if the motion to vacate this court's July 10, 1984 order dismissing appeal 84-3210 is granted because the entry of the June 29, 1984 order was not known to the Third Circuit motion panel at the time the July 10,

1984 order was entered (see Richerson v Jones, 551 F 2d 918 (3rd Cir. 1977) and Fed.R.App.P. 4(a)(2) as to premature appeals, the Court will hear the merits of the 84-3210 appeal, and it is further

ORDERED that in order to implement the hearing of appeal 84-3210, the appellant, Marion Kehoe, is to prepare and serve her brief on counsel for Beatrice Hofmann by November 25, 1985. The brief is to be filed with the Clerk of the District Court in the Virgin Islands in St. Croix. The appellee, Beatrice Hofmann's brief is to be served and filed December 2, 1985; and it is further

ORDERED that argument on appeal 84-3210 will be scheduled for December 4, 1985. Oral argument of 10 minutes for each side is ordered; and it is further

ORDERED that appellant's motion to stay the judicial sale currently scheduled for November 21, 1985 be and is hereby granted until disposition of the within appeals and further order of this Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARION H. KEHOE,

APPELLANT,

v.

Entered:
April 29, 1986

BEATRICE C. HOFMANN,

APPELLEE,

NO. 84-3210

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant, Marion H. Kehoe, in the above-entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

APPENDIX - B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARION H. KEHOE,

APPELLANT,

v.

Entered:
May 5, 1986

BEATRICE C. HOFMANN,

APPELLEE,

ORDER

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and is hereby stayed until June 10, 1986.

APPENDIX - C